

# **EXHIBIT C**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

EPLUS, INC.,

Plaintiff,

v.

Civil Action No.  
3:09CV00620

LAWSON SOFTWARE, INC.,

Defendant.

Before: THE HONORABLE ROBERT E. PAYNE, JUDGE  
HEARING ON EPLUS' MOTION TO STRIKE

May 24, 2010

Richmond, Virginia

CHANDLER and HALASZ, INC.  
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CHANDLER & HALASZ, INC.  
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1 MR. MCDONALD: I disagree with that. That  
2 was the intent.

3 THE COURT: All right. Now -- all right.  
4 Now, why is it pertinent to the issue, why are these  
5 paragraphs pertinent to the issue of invalidity given  
6 that you did not disclose these in your supplemental  
7 invalidity contentions? Why are they -- how do they  
8 get in, given that you violated the instruction that  
9 you were given?

10 MR. MCDONALD: Because we did not violate  
11 any instructions given to us, Your Honor. We did  
12 streamline our invalidity contentions in the  
13 supplemental set on April 9th, but there were no  
14 instructions to us that we had no opportunities after  
15 that date under any circumstances to either, A,  
16 further supplement those or, B, have any variation  
17 whatsoever in our expert report from what's in those.  
18 That was not in the order of the Court and we did not  
19 understand it that way. We certainly --

20 THE COURT: You were told that if you  
21 didn't have the prior art in these supplemental  
22 contentions so people could understand what you were  
23 talking about, it wasn't going to come in at trial. I  
24 don't know how on earth you could think you could get  
25 it in by sticking it in an expert's opinion. That's a

1     disingenuous argument, I think.

2                   MR. MCDONALD: Well, you have the court  
3     order in front of you, Your Honor. We certainly  
4     understood the Court's desire that we limit and bring  
5     down, pare down our invalidity contentions, but we  
6     honestly did not understand that it was going to  
7     become immutable on that date, regardless on either  
8     what our expert thought or regardless of whether the  
9     Markman decision of the Court deviated and went  
10    broader than what we had proposed.

11                  THE COURT: You're just running on about  
12    topics that are unrelated. Now, if the Markman opens  
13    the door, then we can talk about that. What part --  
14    tell me how you are confused by the text on April -- I  
15    mean on March the 26th, beginning with page 4.

16                  What is it that led you believe that you  
17    could do what you've just said; get it in in an  
18    expert's opinion, if you didn't put the contention in  
19    in the supplemental contentions list?

20                  MR. MCDONALD: Well, these are the  
21    initial infrin- -- excuse me. These are the initial  
22    invalidity contentions that we had supplemented. This  
23    would now be the second time --

24                  THE COURT: No, they're not supplemented.

25                  MR. MCDONALD: -- initial invalidity

1 MR. MCDONALD: Yes. We've withdrawn our  
2 depositions of the witnesses.

3 THE COURT: It's out for all purposes.

4 MR. MCDONALD: That's fine.

5 MR. ROBERTSON: Thank you, Your Honor.

6 THE COURT: All right. Well, the pretrial  
7 orders mean what they say, and in the  
8 original Pretrial Schedule A, paragraph J3, to which  
9 the parties agreed, the Court ordered that the  
10 defendant shall file an initial statement identifying  
11 each of its invalidity defenses with specificity, and  
12 such statements shall also include a list of all prior  
13 art on which it relies, including a citation by Bates  
14 number of any documents produced relating to each such  
15 prior art reference, and a complete and detailed  
16 explanation of what it alleges that each listed prior  
17 art reference shows in claim chart form on an  
18 element-by-element, claim-by-claim basis and how that  
19 prior art invalidates the claims asserted by the  
20 plaintiff.

21 On March the 26th, the Court was hearing a  
22 motion to compel brought by the defendants when it  
23 appeared that there was an issue respecting the  
24 invalidity contentions and defenses, and the Court  
25 instructed that the -- said the following: You told

1 me you were going to have seven or eight, and we're  
2 talking about prior art references, and I want you to  
3 do them like I said, claim by claim, element by  
4 element. What is it in that prior -- in the prior  
5 art -- what is it that in the prior art invalidates  
6 it, and then you take the page out of the prior art  
7 and not only do you write it out, you highlight it and  
8 you hand it to them.

9 Basically, it is true, as the defendant  
10 says, that the Court at that juncture did not tell the  
11 defendants that if they didn't have it in the  
12 supplemental list that had been ordered in the right  
13 way, that they would have -- that it wasn't coming in  
14 at all. You don't have to be told that there are  
15 consequences to disobeying scheduling orders.

16 But on April the 9th, there was a  
17 subsequent filing, and the subsequent filing deleted a  
18 number of the -- the prior art references, including  
19 Lawson version 6 and 5.

20 During the course of that discussion on  
21 April the 29th, there came up a discussion about  
22 April -- about Lawson 6.0 version, and I said, Lawson  
23 6.0 version is not in the prior art unless it was  
24 listed in the prior art that was filed on April 9th.  
25 Was it or wasn't it?

1 Mr. Robertson: No, it wasn't.

2 Well, that's that simple.

3 Mr. McDonald: Well, we dispute that, Your  
4 Honor. The document will speak for itself. I  
5 understand you can't decide that now when we're both  
6 saying opposite things.

7 And I said: I have to see more about it,  
8 but I can tell you one thing; if it's not in that  
9 answer, that disclosure, it's not coming in.

10 Yet on May the 3rd, without coming to  
11 court and saying they didn't understand the limits  
12 that had been articulated on April the 29th and March  
13 the 26th and the scheduling order, the defendants  
14 listed a whole bunch of new prior art and invalidity  
15 contentions; thereby frustrating the very purpose of  
16 the order entered, Exhibit A, to the brief of the --  
17 of the plaintiff in this motion, which is Pretrial  
18 Schedule A, J3, which they -- paragraph J3, which they  
19 agreed to. And so if it's not listed on the -- if  
20 something is not listed on the list of prior art filed  
21 on April 9th, it's not coming in.

22 Now, there is a -- an exception to that  
23 rule, and it's created by the decision of the -- of  
24 the Court in Johns Hopkins University versus CellPro.  
25 And while this case is not directly governed by

1 CellPro, it is analogous, and that is that the Markman  
2 opinion gave constructions, and if a -- if -- if a  
3 party can show that a Markman decision somehow changed  
4 the rules of the game, then it is entitled to have  
5 some relief in terms of subsequent discovery or  
6 theories or prior art or invalidity contentions in the  
7 event that that actually happens.

8 Now, I am told here that there are two  
9 instances appearing on page 6 and 7 of the defendant's  
10 brief in which the claim construction necessitated the  
11 presentation of additional opinions. One is -- and  
12 just so the record is clear, we discussed this in  
13 terms of -- in terms that somewhat confuse the record.

14 I kept asking about the first example --  
15 or the first instance given by Lawson, and that  
16 appears on page 6 of their reply -- of their response  
17 brief, and it says, The Court's construction of "means  
18 for building a requisition using data relating to  
19 selected matching items and their associated sources"  
20 was one place that was -- that the Markman -- the rule  
21 of CellPro had to be applied.

22 Because of the very confusing nature of  
23 Mr. Shamos' report and the exhibits to it, one of  
24 which is Exhibit 3 and it wasn't numbered, counsel for  
25 Lawson kept going to a place in the report which



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REPORTER'S CERTIFICATE

I do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes taken in this matter to the best of my ability.

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Tracy Johnson, RPR, CCR, CLR